ORIGINAL

No. 89-7376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PEARLY L. WILSON,

Petitioner,

vs.

RICHARD SEITER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

ELIZABETH ALEXANDER
(Counsel of Record)
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1616 P Street N.W., Suite 340
Washington, DC 20036
(202)331-0500

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216)781-6278

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I. RESPONDENTS MISCHARACTERIZE THE STANDARD APPLIED BY THE SIXTH CIRCUIT

The most important point to be drawn from respondents' opposition to the petition for writ of certiorari is that the respondents decline to defend the decision of the Sixth Circuit on its own terms. The respondents make no argument that the heightened "malicious and sadistic" intent requirement from Whitley v. Albers, 475 U.S. 312 (1986), applies to continuing conditions of confinement. If, as petitioner argues, the Sixth Circuit did apply a "malicious and sadistic" intent standard to the conditions at issue in this case, then nothing in respondents' brief supports a denial of certiorari.

Respondents' assertion that the Court of Appeals did not apply such a standard, respondents' brief at 12, is perplexing. That court stated: "[T]he Whitley standard of obduracy and wantonness requires behavior

marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior." App. at 11-12. A reasonable construction of this passage reveals that the Sixth Circuit required petitioner to show that respondents had acted with "persistent malicious cruelty." Moreover, the Sixth Circuit's focus on the state of mind of prison officials, rather than the objective conditions faced by petitioner, confirms that the court was applying the heightened "malicious and sadistic" standard from Whitley. App. at 10-11; see also Petition at 28-32.[1]

Respondents devote the majority of their brief to arguing that the "obduracy and wantonness" standard of Whitley, 475 U.S. at 319, applies to petitioner's Eighth Amendment

[1] As set forth in the Petition, at 32-35, the Sixth Circuit's use of this incorrect standard led it erroneously to affirm the District Court's grant of summary judgment for respondents.

claims. However, this proposition is utterly noncontroversial--the "obduracy and wantonness" standard applies to all Eighth Amendment claims, as Whitley made clear and as petitioner has pointed out. See Petition at 25. Whitley indicates that this standard is not rigid and monolithic, but must be applied "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U.S. at 320. Thus, when a prisoner claims that his medical needs have been ignored, "obduracy and wantonness" is demonstrated if prison officials acted with "deliberate indifference." Id., quoting Estelle v. Gamble, 429 U.S. 97, 105 (1976). By contrast, "[w]here a prison security measure is undertaken to resolve a disturbance," as in Whitley, this standard is met only if prison officials used force "maliciously and sadistically for the very purpose of causing harm." Id. at 320-321, internal quotation

marks omitted.

In short, the error of the Sixth Circuit was not that it applied the "obduracy and wantonness" standard; rather, the court erred in applying the incorrect prong of that test. Although this case does not involve a prison disturbance, the Sixth Circuit applied the prison disturbance standard: it required petitioner to show that respondents had acted with "persistent malicious cruelty." App. at 12. As explained in the Petition, however, this Court's holding in Whitley requires that petitioner's claims be evaluated under the "deliberate indifference" standard. Had the Sixth Circuit applied the "deliberate indifference" test, it could not have affirmed the District Court's entry of summary judgment for respondents. Petition at 32-35.

II. THE JUDGMENT OF THE COURT OF APPEALS CREATES A CONFLICT AMONG THE CIRCUITS

In respondents' discussion of the conflict among the circuits, respondents implicitly concede that application of a "malicious and sadistic" intent standard from Whitley to continuing conditions of confinement is in conflict with the decisions petitioner cites. Respondents make no attempt to distinguish the cases petitioner cited, nor do respondents even mention the Fifth Circuit cases that conflict with the decision below.[2]

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[2] Petitioner argued that the decision below was in conflict with Foulds v. Corley, 833 F.2d 52 (5th Cir. 1987); Gillespie v. Crawford, 833 F.2d 47 (5th Cir. 1987), judgment reinstated in relevant part, 858 F.2d 1101 (5th Cir. 1988) (en banc); LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987); and Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987). The respondents' brief does not even mention Foulds or Gillespie. Petitioner also argued that the reasoning in the case below was inconsistent with decisions from other circuits that applied a deliberate indifference standard to prisoner conditions of confinement claims, although petitioner did not assert the existence of a direct conflict with those cases. See Petition at 22-24.

Respondents' substantive argument that no conflict exists is based on McGhee v. Foltz, 852 F.2d 876 (6th Cir. 1988). In that case, the Sixth Circuit applied a deliberate indifference standard to a prisoner claim of failure to protect from harm. Petitioner agrees that McGhee is inconsistent with this case. The existence of an intra-circuit conflict, however, does not alter the fact that the most recent pronouncement of the Sixth Circuit is at odds with the views of at least four other circuits.[3] The existence of an intra-circuit, as well as an inter-circuit, conflict argues that this Court should grant certiorari. See, e.g., C.I.R. v. Estate of Bosch, 387 U.S. 456, 457 (1967) (deciding consolidated cases from conflicting decisions of the Second Circuit while noting

[3] Petitioner initially cited cases from three circuits in conflict with this decision. Since that time, another Court of Appeals has issued a decision in direct conflict with this case. See this brief at 7-10.

"a widespread conflict among the circuits"); Scarborough v. United States, 431 U.S. 563, 567 n.4 (1977) (granting certiorari "in view of the split among the circuits on this issue," and citing as one of the conflicts an apparent intra-circuit conflict); and Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950) (certiorari granted "because of this intracircuit conflict").

Moreover, since the filing of the Petition in this Court, another Court of Appeals has registered its disagreement with the analysis of the Sixth Circuit in this case. Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990), involved a damages suit under 42 U.S.C. sec. 1983 by the widow of a prisoner who had been murdered by other prisoners, allegedly as a result of the wrongful conduct of his jailers. In the course of determining the proper Eighth Amendment test to apply, the Tenth Circuit analyzed Whitley as follows:

Whitley involved a sec. 1983 suit brought by a prison inmate alleging a violation of his Eighth and Fourteenth Amendment rights when he was injured during the quelling of a prison riot. The Court held that, in the context of a prison riot, where "decisions necessarily [are] made in haste, under pressure, and frequently without the luxury of a second chance," the Eighth Amendment standard is "'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" [citation.] This standard, however, does not apply to every Eighth Amendment claim. Even while defining its new "malicious[] and sadistic[]" standard, the Court carefully preserved the applicability of its "deliberate indifference" standard, articulated in Estelle v. Gamble....Other courts have accepted the Supreme Court's invitation to interpret the Whitley standard narrowly. See, e.g., Vaughan v. Ricketts, 859 F.2d 736, 741-42 (9th Cir. 1988) (digital body cavity searches, "while involving a threat to security, did not constitute an ongoing prison disturbance," and "the officers were not confronted

with an instantaneous decision whether to conduct the searches in the manner described"), cert. denied, ___ U.S. ___, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989); Stubbs v. Dudley, 849 F.2d 83, 86 (2d Cir. 1988) ("Whitley does not require that every case involving a guard's failure to protect a prisoner threatened by other prisoners be decided under a heightened standard appropriate for determining the lawfulness of using force to quell a prison riot."), cert. denied, ___ U.S. ___, 109 S.Ct. 1095, 103 L.Ed.2d 230 (1989); Foulds v. Corley, 833 F.2d 52, 54-55 (5th Cir. 1987) (Whitley's heightened standard does not govern all actions of prison officials "ostensibly under the guise of achieving prison security").

After careful consideration, we hold that Whitley's "malicious and sadistic" standard does not apply to the facts of this case; rather, the applicable standard is the traditional "deliberate indifference" inquiry of Estelle. Unlike Whitley, here there is no danger that the deliberate indifference standard will fail to "adequately capture the importance of...competing obligations, or convey the appropriate hesitancy to critique in hindsight

> decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." Whitley, 475 U.S. at 327, 106 S.Ct. at 1088.

Berry, 900 F.2d at 1494-1495. The Berry court emphasized "the distinction so carefully preserved in Whitley between the malicious and sadistic standard applicable in prison riot situations and the deliberate indifference standard applicable to more ordinary prison policy decisions." Id. at 1495. See also id. at 1496 n.8 (noting "the Supreme Court's careful distinction in Whitley between riot and more ordinary circumstances").

Thus, the Tenth Circuit has joined the Fourth, Fifth, and District of Columbia Circuits in an interpretation of Whitley that conflicts directly with the view of the Sixth Circuit as expressed in this case. This Court should grant certiorari to resolve this conflict.

The other cases cited by respondents are simply not on point. Campbell v. Grammer,[4] 889 F.2d 797 (8th Cir. 1989), involved a disturbance in which prisoners were setting fires, throwing human waste on staff members, and otherwise physically abusing the staff. A prison official had information that several prisoners were armed with knives. Id. at 800. Following this Court's guidance in Whitley, the Eighth Circuit applied the "malicious and sadistic" test to prisoners' claims that the Eighth Amendment had been violated when officials moved to restore order. Id. at 802. In Cody v. Hillard, 830 F.2d 912, 915 (8th Cir. 1987), cert. denied, 485 U.S. 906 (1988), the same circuit, sitting en banc, applied the "obduracy and wantonness" test to a claim that double-celling violated the Eighth Amendment. This is of no assistance to respondents, since

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[4] Respondents incorrectly cite this case as Campbell v. Garza.

that standard applies to all Eighth Amendment claims.

Vigliotto v. Terry, 873 F.2d 1201 (9th Cir. 1989), did not involve continuing conditions of confinement but a single search of a single prisoner's cell. Id. at 1201-1202. Again, the Court of Appeals properly applied the Whitley "obduracy and wantonness" standard. Id. at 1203. Finally, Birrell v. Brown, 867 F.2d 956 (6th Cir. 1989), has no application to this case. There, the court stated, "[b]ecause we believe that both defendants are protected by qualified immunity, we will not discuss the eighth amendment aspects of this case." Id. at 958.

III. THE ERROR OF THE SIXTH CIRCUIT WAS NOT HARMLESS

Finally, respondents argue that the error of the Sixth Circuit was harmless, since petitioner's claims would fail even under the correct, "deliberate indifference" standard.

Respondents' brief at 18. Obviously this represents pure speculation. The Sixth Circuit's dictum that the respondents' actions amounted, at most, to negligence, App. at 12, ignores the uncontradicted affidavits submitted by petitioner to the effect that he had put respondents on actual notice of the conditions and that respondents had failed to take any action with regard to the continuing conditions.[5] Petition at 9-10. As the Sixth Circuit noted, a number of the conditions detailed in petitioner's affidavits have been found in other cases to violate the Eighth Amendment. App. at 5. The allegations of actual notice to respondents, coupled with claims of obvious

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[5] Respondents quote extensively from the opinion of the District Court, but fail to point out that that court committed error when, on cross-motions for summary judgment, it simply adopted the findings in respondents' affidavits in the face of conflicting affidavits from petitioner. The Sixth Circuit noted that the District Court so erred. App. at 5-6.

conditions violating the Eighth Amendment, would, if proven, constitute deliberate indifference, not mere negligence. Cf. City of Canton, Ohio v. Harris, 109 S.Ct. 1197, 1209 (1989) (O'Connor, J., concurring).

However, this Court need not decide whether the conduct of respondents, if proven, would constitute negligence or deliberate indifference. Since the Sixth Circuit's erroneous choice of the "malicious and sadistic" standard may well have affected its entire view of the facts, this Court may reverse and remand to the Sixth Circuit for consideration of this issue under the proper, "deliberate indifference" standard. Cf. American Foreign Service Ass'n v. Garfinkel, 109 S.Ct. 1693, 1697 (1989) (returning remaining issue to lower court when lower court had previously analyzed issue "only in abbreviated fashion" so that this Court did not have benefit of lower court's analysis to guide resolution of the merits).

Respectfully submitted,

ELIZABETH ALEXANDER
(Counsel of Record)
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1616 P Street N.W., Suite 340
Washington, DC 20036
(202)331-0500

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216)781-6278

Attorneys for Petitioner

July 9, 1990

IN THE

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Respondents.

No. 89-737

CERTIFICATE OF SERVICE

I hereby certify that I have served by first class mail, postage prepaid, three copies of the Petitioner's Reply Memorandum

in the above-entitled case, on the following counsel of record, this 9th day of July 1990.

Rita S. Eppler
Frederick C. Schoch
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, OH 43266-0410
(614) 466-5414
Counsel for Respondents

Elizabeth Alexander
National Prison Project of the
American Civil Liberties Union
Foundation
1616 P Street, N.W., Suite 340
Washington, D.C. 20036
(202) 331-0500
Counsel for Petitioner

Sworn to and subscribed before me
this 9th day of July,
1990.

Notary Public

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CASILLAS PRESS, INC.

Barbara S Banks

1717 K Street, N.W.
Washington, D.C. 20036
Telephone: 223-1220